

**Cc:** Charles Smith[charles.r.smith567.civ@mail.mil]; Cindy Barger[cindy.s.barger.civ@mail.mil]; Moyer, Jennifer A CIV USARMY CEHQ (US)[Jennifer.A.Moyer@usace.army.mil]; Lopez Ortiz, Myrna I CIV USARMY CEHQ (US)[Myrna.I.Lopez-Ortiz@usace.army.mil]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]  
**To:** JAMES, William L CIV USARMY CELRD (US)[William.L.James@usace.army.mil]  
**From:** Hurlid, Kathy  
**Sent:** Mon 6/19/2017 5:02:26 PM  
**Subject:** Re: [Non-DoD Source] Fw: Follow-up on question on state assumable waters (UNCLASSIFIED)

Yes, thanks William, this is the project. However, the permit was withdrawn and is either just with MDEQ or will be soon. -Kathy

Sent from my iPhone

> On Jun 19, 2017, at 12:21 PM, JAMES, William L CIV USARMY CELRD (US)  
 <William.L.James@usace.army.mil> wrote:  
 >  
 > CLASSIFICATION: UNCLASSIFIED  
 >  
 > Kathy,  
 >  
 > See attached. I believe this is the one the Tribe is talking about.  
 >  
 > -----Original Message-----  
 > From: Hurlid, Kathy [mailto:Hurlid.Kathy@epa.gov]  
 > Sent: Monday, June 19, 2017 9:36 AM  
 > To: Smith, Charles R "Chip" <charles.r.smith567.civ@mail.mil>; Barger, Cindy S  
 <cindy.s.barger.civ@mail.mil>  
 > Cc: JAMES, William L CIV USARMY CELRD (US) <William.L.James@usace.army.mil>; Moyer,  
 Jennifer A CIV USARMY CEHQ (US) <Jennifer.A.Moyer@usace.army.mil>; Lopez Ortiz, Myrna I CIV  
 USARMY CEHQ (US) <Myrna.I.Lopez-Ortiz@usace.army.mil>; Eisenberg, Mindy  
 <Eisenberg.Mindy@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>  
 > Subject: Re: [Non-DoD Source] Fw: Follow-up on question on state assumable waters  
 (UNCLASSIFIED)  
 >  
 > Hi Chip,  
 >  
 > Waiting until Jen returns sounds good. I know that Rose wanted to respond to the Tribe quickly but I  
 don't think a quick response is critical since it is a 404 permitting issue, not a WOTUS rulemaking issue.  
 We want to have all the info before responding to several of the questions. As far as I know, the permit is  
 not yet out for comment (I'm not even sure the state has a permit application yet).  
 >  
 > I can send them a quick response simply giving them the Assumable Waters Subcommittee Report link  
 on our web so they know we are not ignoring their inquiry. you are okay with that.  
 >  
 > Thanks for reaching out and I look forward to speaking or seeing you the week of the 26th. I'll look for  
 time for a meeting. I hope all is well.  
 >  
 > - Kathy  
 >  
 > \_\_\_\_\_  
 > From: Smith, Charles R CIV (US) <charles.r.smith567.civ@mail.mil>  
 > Sent: Monday, June 19, 2017 9:25 AM  
 > To: Cindy Barger; Hurlid, Kathy  
 > Cc: James, William L LRN; Moyer, Jennifer A HQ02; Lopez-Ortiz, Myrna I HQ  
 > Subject: RE: [Non-DoD Source] Fw: Follow-up on question on state assumable waters

(UNCLASSIFIED)

>

> CLASSIFICATION: UNCLASSIFIED

>

> Hi Kathy:

>

> Our paths cross again. Hope you are well.

>

> As you know, Jennifer Moyer and William James are the SME's on this, with me in the policy oversight position. We have been working closely together with you and the Assumption group for the past year or so. Jennifer is TDY this week so I suggest that we pause and pick this up the week of June 26th when she is back in the office. Perhaps we can set up a conference call.

>

> Chip

>

> -----Original Message-----

> From: Barger, Cindy S CIV USARMY HQDA ASA CW (US)

> Sent: Monday, June 19, 2017 9:07 AM

> To: Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Smith, Charles R CIV (US) <charles.r.smith567.civ@mail.mil>; Jennifer Moyer <Jennifer.A.Moyer@usace.army.mil>

> Subject: RE: [Non-DoD Source] Fw: Follow-up on question on state assumable waters

>

> Hi Kathy - Rose said there was someone else she was going to have to pass this off too :) Sure I can give you a summary of the discussion - it was a short discussion mainly the tribe relaying their questions/concerns and me saying we'll have someone get back with you after the tribal listening session and the notes below are the . I passed this off to Chip and Jennifer as well since I'm also not the state assumption person.

>

> Chip and Jennifer and going to follow-up with the tribe once they developed an appropriate response. I would recommend coordinating with them directly.

>

> Cindy

> -----Original Message-----

> From: Hurlid, Kathy [mailto:Hurlid.Kathy@epa.gov]

> Sent: Monday, June 19, 2017 8:59 AM

> To: Barger, Cindy S CIV USARMY HQDA ASA CW (US) <cindy.s.barger.civ@mail.mil>

> Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Gude, Karen <Gude.Karen@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

> Subject: [Non-DoD Source] Fw: Follow-up on question on state assumable waters

>

> All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

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>

> Hi Cindy,

>

> I'm the person at EPA HQ that deals with CWA 404 assumption by states. Karen and Rose unfortunately are not the correct folks to work with - although there is enough work I'd welcome their help!

>

> I'd be interested in talking to you about your notes below before I craft a response and coordinate with our regional office, the Detroit District and our general counsel here. I think we, the agencies, need to be

careful how we respond to this as the inquiry has come in under WOTUS consultation but is specifically concerning a permit. So how we respond is as important as the response itself. The short answer is just because it is a navigable water or an interstate water, that does not mean the state (or tribe) cannot assume administration of the 404 program for that water. But it is more nuanced than that as the statute says states may assume "... the navigable waters (except those ...)"

>

> Thanks,

>

> Kathy

>

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> From: Kwok, Rose

> Sent: Friday, June 16, 2017 5:47 PM

> To: Hurl, Kathy

> Cc: Melgin, Wendy; Burdick, Melanie; Downing, Donna

> Subject: RE: Follow-up on question on state assumable waters

>

> There was not an official inquiry that they wrote to us, this was verbal communicated to us and captured in Cindy's notes.

>

> -----Original Message-----

> From: Hurl, Kathy

> Sent: Friday, June 16, 2017 5:42 PM

> To: Kwok, Rose <Kwok.Rose@epa.gov>

> Cc: Melgin, Wendy <melgin.wendy@epa.gov>; Burdick, Melanie <Burdick.Melanie@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>

> Subject: Re: Follow-up on question on state assumable waters

>

> Rose, I will need to work with ogc and R5 on a response. Please say you are forwarding these two questions to the folks that deal with assumption. Was there an official written inquiry or just your notes?

>

> Thanks, Kathy

>

> Sent from my iPhone

>

>> On Jun 16, 2017, at 4:02 PM, Kwok, Rose <Kwok.Rose@epa.gov> wrote:

>>

>> FYI - I had forgotten about the first two requests below (I'll repaste above here):

>>

>> They have requested that EPA and the Corps follow up with them to provide

>> (a) documentation to show the rationale on Michigan assuming 404 authority on this water (Michigan has only provided a final decision of authority rather than the legal rationale)

>> (b) provide if there is any avenue within EPA to appeal the determination on state assumable waters

>>

>> Any thoughts before I respond to Chairman Besaw?

>>

>>

>> -----Original Message-----

>> From: Barger, Cindy S CIV USARMY HQDA ASA CW (US) [Caution-mailto:cindy.s.barger.civ@mail.mil]

>> Sent: Friday, June 16, 2017 3:44 PM

>> To: Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>; Jennifer Moyer <Jennifer.A.Moyer@usace.army.mil>; Amy KLEIN (amy.s.klein@usace.army.mil) <amy.s.klein@usace.army.mil>; JAMES, William L CIV USARMY CELRD (US) <William.L.James@usace.army.mil>

>> Cc: Charles Smith <charles.r.smith567.civ@mail.mil>; Kwok, Rose <Kwok.Rose@epa.gov>; Gude, Karen <Gude.Karen@epa.gov>

>> Subject: FW: Follow-up on question on state assumable waters  
 >>  
 >> Jenn et al - Here's what I sent Mr. Besaw from the Menominee Nation.  
 >>  
 >> Rose and Karen - for your information too as I'm sure Corps will be talking with whomever you have passed the questions off to.  
 >>  
 >> Here's the short summary of his key issues and his contact info.  
 >>  
 >>> The Menominee Nation is unclear on the rationale that the State of Michigan has followed in determining that the Menominee River is a water that is regulated by the State under state assumption authority under CWA 404g. Based on their review, it appears the Menominee River is both clearly an interstate river (flowing between Wisconsin and Michigan) and a navigable water and therefore should be under Corps jurisdiction. Of particular concern is a proposed open pit mine impacting adjacent wetlands and waters of the Menominee River that is near tribal traditional cultural properties and graves of which there is no nexus to NHPA due to state assumption.  
 >>>  
 >>> They have requested that EPA and the Corps follow up with them to provide  
 >>> (a) documentation to show the rationale on Michigan assuming 404 authority on this water (Michigan has only provided a final decision of authority rather than the legal rationale)  
 >>> (b) provide if there is any avenue within EPA to appeal the determination on state assumable waters  
 >>> (c) receive a copy of the final report from the State Assumption subcommittee for NACEPT - understanding this is a recommendation for consideration for future states not those states who have already assumed authority.  
 >>>  
 >>> Mr. Besaw's contact information is Mr. Gary Besaw, Tribal Chairman of the Menominee Nation, gbesaw@mitw.org 715-799-5114.  
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 >>  
 >> -----Original Message-----  
 >> From: Barger, Cindy S CIV USARMY HQDA ASA CW (US)  
 >> Sent: Friday, June 16, 2017 12:16 PM  
 >> To: 'gbesaw@mitw.org' <gbesaw@mitw.org>  
 >> Cc: Smith, Charles R CIV (US) (charles.r.smith567.civ@mail.mil) <charles.r.smith567.civ@mail.mil>  
 >> Subject: Follow-up on question on state assumable waters  
 >>  
 >> Mr. Besaw - It was very nice to meet you at the NCAI meeting this week. In follow-up to your questions on Michigan and the assumption of the section 404 program, I have referred your questions to Mr. Chip Smith and colleagues in the Corps Headquarters Regulatory Program. Chip is the Assistant for Environmental, Tribal and Regulatory Affairs in our office. They and EPA will be getting back with you in the near future to discuss further.  
 >>  
 >> In the interim, Chip will be the best contact on the progress of your request. Chip's number is 703-693-3665  
 >>  
 >> Also, as requested, here is the link to the final report completed by the assumption subcommittee for NACEPT. Caution-Blocked<https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report>  
 >>  
 >> Thanks! Cindy  
 >>  
 >> Cindy S. Barger  
 >> Environmental Planner  
 >> Office of the Assistant Secretary of the Army (Civil Works) Project Planning and Review

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